

The Alternative Investment Fund
Managers Directive

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CHAPTER 23

AIFMD and Private Equity

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§23.01 INTRODUCTION

The AIFMD has designed a “one-size-fits-all” approach by establishing general rules applicable to all alternative investment funds (AIFs) outside scope of the UCITS regardless of their investment strategy, encompassing, among other things, real estate, hedge and private equity funds. Regulating, under the same rules, all types of funds that are not within the scope of the UCITS seemed ill-advised. Consequently, there was strong pressure from relevant industry bodies of all asset classes, including private equity, to have specific issues relating to their asset class implemented or for regulations to, at the very least, be tailored to their asset class.

In this, the private equity industry has had limited success. The Directive and the implementing legislation do contain some provisions addressing the specifics of the private equity sector, but this could have gone further. Therefore, the AIFMD is now a reality for private equity manager in the EU, or outside the EU, which intends to market interests in AIFs or manage AIFs in the EU.

At the same time, other European regulations have been adopted that potentially affect private equity. One is the EuVECAR,¹ which offers a European passport to “sub-AIFMD threshold managers”² for the marketing of “qualifying venture capital

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1. Regulation (EU) No. 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds. The EuVECAR offers AIFMs the option of a European passport, with less administrative burdens than the AIFMD imposes, albeit only if they meet certain requirements, including that 70% of commitments (after expenses and cash holdings) are invested in small- and medium-sized enterprises as detailed further M. Fenwick & E. Vermeulen, *How to “Fix” the Venture Capital Model? Regulation Versus Disruption*, Ch. 7.
 2. AIFMs not exceeding the threshold referred to in point (b) of Article 3(2) of AIFMD and, as a result thereof, subject to registration with the Competent Authority of their home Member State in accordance with point (a) of Article 3(3) of AIFMD.

funds”³ subject to significantly less stringent requirements than the AIFMD itself. Sub-threshold AIFMD managers marketing AIFs under the EuVECA label do have to comply with a number of organizational and transparency requirements, for example, own funds, conflicts of interest, delegation, valuation and audit and required contents of pre-investment disclosures. Due to an amendment of the EuVECA regulation,⁴ the EuVECA regime is also available for AIFMs, which are licensed under the AIFMD. The reason for licensed AIFMD managers for using the EuVECA label is that pursuant to EuVECA, it is also allowed to market to non-professional investor which invest more than EUR 100,000, provided certain conditions are met.⁵

Consequently, the regulatory landscape for private equity funds has developed further and AIFMD is not the sole relevant regulatory framework.

The provisions of the AIFMD that have impacted private equity fund managers (“PEM”) the most seem to have been the following:

- (1) exemptions for “small” manager;
- (2) leverage;
- (3) marketing of interests both for AIFM licensed managers and for “small” managers;
- (4) identifying the AIFM;
- (5) minimum capital requirements;
- (6) delegation;
- (7) operating conditions (specifically, separating portfolio management and risk management and valuation functions);
- (8) depositaries;
- (9) transparency; and
- (10) asset stripping provisions.

These provisions are addressed below. However, before describing the potential issues that arise from the AIFMD’s implementation, we will describe a typical private equity fund structure, as a background to some of the issues that will be described below.

3. To qualify as a qualifying venture capital fund, the fund must: (1) be an AIF within the meaning of the AIFMD, i.e., it must be a collective investment undertaking that is no UCITS and collects capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors; (2) intend to invest at least 70% of its aggregate capital contributions and uncalled committed capital in assets that are “qualifying investments”; (3) no more than 30% of its aggregate capital contributions and uncalled committed capital may be invested in assets other than qualifying investments, and (4) be established in an EU Member State.

4. Regulation (EU) 2017/1991 of the European Parliament and of the Council of 25 October 2017.

5. Article 6 of EuVECAR.